BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALBERTO MORALES	)	
Claimant	)	
	)	
VS.	)	
	)	
HUTTON CONSTRUCTION CORPORATION	)	
Respondent	)	Docket No. 1,040,150
	)	
AND	)	
	)	
BUILDERS MUTUAL CASUALTY CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the July 24, 2008, preliminary hearing Order entered by Administrative Law Judge John D. Clark. James A. Cline, of Wichita, Kansas, appeared for claimant. Larry G. Karns, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was injured by an accident that arose out of and in the course of his employment with respondent and, accordingly, ordered respondent to pay medical benefits and temporary total disability benefits until claimant is released.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 24, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of whether claimant suffered an accidental injury on April 23, 2008, and whether the alleged injury arose out of and in the course of his employment. Respondent argues that the only evidence offered of an accidental injury

occurring on April 23, 2008, was the testimony of the claimant and that claimant is not credible. In the event the Board finds claimant met his burden to prove he suffered an accidental injury on April 23, 2008, respondent contends that claimant should nevertheless be denied temporary total disability benefits because he was terminated for cause before reporting an injury to his employer.

Claimant requests that the Board affirm the decision of the ALJ.

The issues for the Board's review are:

(1) Did claimant suffer injury by an accident that arose out of and in the course of his employment with respondent?

(2) If so, should claimant be denied temporary total disability benefits because he was terminated for cause?

FINDINGS OF FACT

Claimant was employed by respondent, a construction company, as a laborer. On April 23, 2008, he was riding in a van with coworkers, returning from a work site. He was in the back seat of the van and was wearing a seat belt. He testified that the driver of the van slammed on the brakes hard, causing his neck to move forward and backwards. He also said he hit his left arm and left shoulder. Then the van was sideswiped by another vehicle, which claimant said shook the van. He is claiming injuries from both the van driver slamming on the brakes and then from the force of the van shaking when it was hit by another vehicle.

Claimant first testified that no one asked if he had been injured. Later he admitted that he had been asked by police officers, firemen and EMTs if he had been injured and, although he had a headache, he told them he was uninjured.

Claimant's coworkers who were in the van testified at the preliminary hearing. Jerad Scott testified that he was driving the van involved in the accident on April 23. He testified that he saw a line of vehicles stopped in the roadway about a half mile ahead of him. He had plenty of time to slow down and did not slam on his brakes. He described the stop as an average stop. He did not give anyone in the van warning that he was going to stop. After he had been stopped about 10 seconds, a vehicle traveling in the left-hand lane passed and grazed the side of the van. Mr. Scott heard the sound of the van being hit but there was no noticeable movement of the van when it was hit. To his knowledge, none of the occupants of the van were moved around either by the act of stopping the van or being grazed by another vehicle. He said he did not swerve the van but pulled to the side of the road after being hit. He asked all the occupants of the van, including claimant, if anyone had been injured, and everyone responded that they were fine. He called respondent's general superintendent, who told him to check again with everyone to see if they were

okay. He asked a second time if everyone was okay, and again the response was that everyone was fine, including claimant.

Eric Gonzales testified he was in the van. He was sitting behind the driver and was able to see there was traffic ahead and knew the driver was going to slow down. He said the driver of the van did not slam his brakes but slowed down to be cautious and then came to a complete stop. He heard the van being grazed by another vehicle but did not feel any movement of the van when that occurred. He did not see anyone being thrown around inside the van. Claimant was sitting behind him, and he was not looking in that direction during the incident.

Chris Hopping was sitting in the front passenger seat of the van. He observed stalled traffic ahead. He said the driver of the van slowed down and came to a stop without slamming on the brakes. Nothing about that stop caused him to be thrown forward. He was not able to observe anyone else in the van. He heard the van being grazed by another vehicle but did not notice any movement of the van when that occurred. He was present when claimant was asked by the state trooper, a fireman, and an EMT if he was okay, and heard claimant answer that he was fine.

When claimant returned to respondent's shop that day, he was terminated. Jack Schulte, respondent's operations manager, testified that claimant was terminated because he had been involved in several altercations with other employees, had made threats, and had a hot temper. The decision to terminate claimant that day was made before the motor vehicle accident occurred. Claimant had not reported any work-related injury before he was terminated. Mr. Schulte testified that respondent had a light duty program and that had claimant not been terminated for cause, he would have been offered work that accommodated his restrictions.

The next day, claimant sought treatment at the emergency room complaining of pain in his low back, neck, right and left hips, and left shoulder, arm, elbow and forearm. He complained additionally that he had numbness down his left arm and his left hand was unable to grip. He was diagnosed with a neck and lumbar strain with left arm radiculopathy and was given prescriptions for pain relief and anti-inflammatories.

Claimant reported the injury to respondent and was sent to Occupational Health Services (OHS) on May 3, 2008. There he was diagnosed with a mild cervical and lumbar sprain and a contusion of the forearm and thumb. Claimant was told to take Advil as needed. He was given restrictions of no lifting over 25 pounds using the left arm. Claimant returned to OHS on May 8 complaining that his lumbar and cervical pain had not improved. He was put on Skelaxin and Mobic and was continued on a lifting restriction of 25 pounds, as well as limiting repetitive bending and walking as tolerated. He was also seen by Dr. Chang, who took him off work as of July 16, 2008. Claimant has not worked since the accident, claiming he could not find a job because of his restrictions. He continues to be treated by Dr. Chang.

At the request of claimant's attorney, claimant was seen by Dr. Fluter, who diagnosed him with cervicothoracic strain or sprain with possible cervical radiculopathy, left shoulder pain/impingement, and possible left upper extremity strain. He opined that there was a causal relationship between the accident and claimant's current condition. He also gave claimant restrictions.

Claimant had problems with his neck before the accident of April 23, 2008. He was injured when a clump of dirt fell on his head while working for another employer. He had physical therapy and was given permanent lifting and movement restrictions. He settled his workers compensation claim in that case. Claimant said that his neck problems from this previous accident had resolved, and he passed a physical examination before he came to work for respondent. He was able to work for respondent for several months with no problem before the accident of April 23, 2008.

At the preliminary hearing, claimant initially denied having any accidents or injuries after the April 23, 2008, accident. However, upon further questioning he admitted he had been injured in June 2008 in a fight with his 28-year-old son. He first said he had been hit once in his mouth, and later said he had been hit twice, once in his mouth and again in his eye.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[1] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[2]

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[1] K.S.A. 2007 Supp. 44-501(a).

[2] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[3]

Where respondent is asserting an intervening injury, it is respondent's burden to prove that the intervening injury was the cause of claimant's permanent impairment rather than the work-related injuries.[4]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(+i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[6]

ANALYSIS

Claimant contends he injured his neck, back, arm, and shoulder when the driver of the van "slammed on the brakes very hard."[7] He added that the van was struck by another vehicle which "shook us."[8] These two incidents allegedly caused claimant to move forward and back and side to side so forcefully that he was injured. However, claimant repeatedly

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[3] *Id.* at 278.

[4] *Desautel v. Mobile Manor Inc.*, Nos. 262,971 & 262,972, 2002 WL 31103972 (Kan. WCAB Aug. 29, 2002), *cf. Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 4, 59 P.3d 352 (2002).

[5] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[6] K.S.A. 2007 Supp. 44-555c(k).

[7] P.H. Trans. at 7.

[8] *Id.* at 11.

denied sustaining any injuries that day when he was asked by the driver, his coworkers, the police, the firemen, and the EMTs at the scene, and later his supervisor at the shop.

In addition, claimant's descriptions of both the van coming to a stop and the accident are contradicted by all of the other witnesses, including the van's driver and two of the other three passengers in the van. The third passenger, Greg, did not testify. The driver of the van, Jerad Scott, testified that he slowed to a normal complete stop. It was not an emergency stop, and he did not slam on his brakes. The so-called accident consisted of the van being "grazed" by another car. Mr. Scott said neither the stop nor the other vehicle caused him to move forward and back or side to side. The photograph of the damage done to the van supports Mr. Scott's testimony that it was a very minor accident. There is almost no damage to the van other than a black smudge and scrape on its driver's side.

Eric Gonzales likewise described the van as coming to a normal stop and said the accident did not cause the van to move. Neither the stop nor the accident caused Eric to move forward or back or be thrown around in the van.

Similarly, Chris Hopping said it was "a typical just slow stop that you would make anywhere."[9] He heard the van being scraped by another car, but he did not notice any movement of the van. He was not thrown forward or back or side to side. Mr. Hopping said it was more like no impact had occurred than like even a minimal impact.

To the extent the medical records support causation, it must be remembered that those medical providers were relying upon the history given to them by claimant, a history of a forceful, sudden swerve or stop and a forceful collision between two vehicles. That history is not supported by the greater weight of the credible evidence.

Finally, claimant has a history of neck and back problems, as well as left arm numbness and weakness that predate this accident. Based on the record presented to date, claimant has failed to prove that his current symptoms are due to the incidents that occurred in the van on April 23, 2008.

CONCLUSION

Claimant has failed to prove his injuries arose out of and in the course of his employment with respondent.

[9] *Id.* at 35.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated July 24, 2008, is reversed.

IT IS SO ORDERED.

Dated this _____ day of October, 2008.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: James A. Cline, Attorney for Claimant
Larry G. Karns, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge